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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-1017

MIKE GRAVEL,
UNITED STATES SENATOR,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

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Petitioner, Mike Gravel, United States Senator, respectfully prays that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the First Circuit entered in this proceeding on January 7, 1972, and January 18, 1972, and the amended judgment of that Court entered January 18, 1972.

OPINIONS BELOW

The opinions of the Court of Appeals and the Protective Order (as modified) which was entered are not yet reported and appear in the Appendix hereto. The opinion of the District Court is reported at 332 F. Supp. 930 (D. Mass. 1971).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on January 7, 1972. A timely petition for rehearing was denied on January 18, 1972, and this petition for certiorari was filed by February 10, 1972. The mandate of the Court of Appeals was stayed by Mr. Justice Brennan on January 24, 1972, pending the filing and disposition of the petition for writ of certiorari, provided that filing of the certiorari petition occur on or before February 10, 1972.

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Does the constitutional responsibility of a United States Senator to inform his constituents and colleagues about the workings of government require that his actions in publishing an official, public record of the Subcommittee of which he is chairman, containing documentary information critical of Executive conduct in foreign affairs, be accorded protection as legislative activity under the Speech or Debate Clause?

2. May a Federal Grand Jury at the request of the Executive Branch inquire into and investigate the legislative activities of a Senator by utilizing compulsory process to interrogate persons with whom a Senator dealt and to secure documents, about his planning and executing a Senate Subcommittee hearing and publishing the official record of that hearing?

3. May an otherwise impermissible inquiry be allowed because the legislative activity in question was carried out in a manner deemed by a Federal court to be irregular and contrary to the court's notions of germaneness and of the proper way for the Senate to internally allocate its functions?

CONSTITUTIONAL PROVISION INVOLVED

The Speech or Debate Clause of the Constitution Article I, Section 6, Clause 1, provides:

> ". . . and for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other Place."

STATEMENT OF THE CASE

This case involves the claim of a United States Senator that the Speech or Debate Clause of the Constitution and the doctrine of Separation of Powers guarantee that he may engage in the unfettered discharge of his legislative privileges and duties without restraint and inquiry by the Executive and Judicial Branches, operating through the Grand Jury. The questions involved in this case are of the highest magnitude and the manner in which they are resolved will have a significant effect upon the ability and willingness of the members of Congress to carry out their legislative duties. The relevant facts giving rise to the issues in this case are as follows:[1]

On June 29, 1971, Senator Gravel convened a hearing of the Subcommittee on Buildings and Grounds of the Public Works Committee of the United States Senate. He stated at the outset of the hearings that the conduct of United States foreign policy in Indochina was relevant to his subcommittee, as to practically every subcommittee in the Congress, because of its effect upon the domestic economy and, specifically, the lack of sufficient federal funds to pro-

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[1] Due to the expedited schedules which have been set by both the Court of Appeals and by this Court, and transcription delays by the District Court reporter, the complete record of proceedings in the District Court is not yet available for certification. However, as the District Court noted, the facts are not in dispute and have formed the basis of the legal submissions of all parties. 332 F. Supp. at 933 n. 3.

vide for adequate public facilities. During the course of this hearing, Senator Gravel read or inserted into the record portions of the so-called "Pentagon Papers", which examine the causes and history of the conflict in Indochina. In order to make the contents of the Subcommittee record widely available to his colleagues and the electorate, Senator Gravel arranged, without any personal profit to himself, for its verbatim publication by Beacon Press, a non-profit publishing division of the Unitarian Universalist Association.

In August of 1971, a Federal Grand Jury sitting in Boston, Massachusetts, and investigating the release of the Pentagon Papers to the press, subpoenaed Dr. Leonard Rodberg, an aide of Senator Gravel. The Senator moved to intervene and quash the subpoena on the grounds that the purpose of the proposed inquiry of his aide was to investigate his own activity which he asserted was immune from judicial inquiry by virtue of the Speech or Debate Clause. A subpoena was also served upon Howard Webber, Director of Massachusetts Institute of Technology Press, with whom the Senator and his aides had unsuccessfully negotiated for the publication[2] of the Subcommittee record. During the pendency of the appeal, two subpoenas were served upon officials of Beacon Press but were revoked due to the stay in effect.

The District Court granted the motion to intervene, and found, *inter alia*, that "the Government's interest in [Dr. Rodberg's] testimony pertains to his acts as Senator Gravel's assistant with regard to the Pentagon Papers and that the government attorneys plan to question him about them before the grand jury." 332 F. Supp. at 933. The Court denied the motion to quash Dr. Rodberg's subpoena, but

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[2]The publication by Beacon Press has variously been referred to in the opinions and papers below as the "publication" and as the "republication." Inasmuch as the Beacon Press edition was the first occasion on which the Subcommittee record was printed after its compilation, we use the term publication.

issued a Protective Order barring inquiry of any witness into Senator Gravel's actions in holding the hearing and in preparing for it. The Court held, however, that the verbatim publication of the record "stands on a different footing" and is not protected by the legislative privilege. *Id.*, at 936-37. With respect to the Webber subpoena, the Government conceded in oral argument that its primary reason for calling him was to question him about conversations with the Senator's aides; the subpoena itself demanded production of all notes relating to Dr. Rodberg and the Pentagon Papers. Intervention was also allowed in this matter, but the motion to quash Webber's subpoena was denied.

Senator Gravel appealed to the United States Court of Appeals for the First Circuit, and the Government cross-appealed.[3] The Court of Appeals' opinion of January 7, 1972, noted that "important questions as to the extent of the legislative privilege" were raised by the appeal (App. 2A). The Court of Appeals concluded that Senator Gravel "has essentially lost his appeal," and affirmed the judgment of the District Court and entered a modified Protective Order (App. 13-15A). The Court held that the constitutional privilege of the Speech or Debate Clause did not extend to Senator Gravel's exercise of the informing function in publishing the Subcommittee record and therefore did not bar grand jury investigation into, for example, the Senator's communications with Webber and Beacon Press. The Court also held that the Grand Jury in conjunction with the Executive could interrogate all persons other than the Senator's

[3]There was jurisdiction over the appeal under 28 U.S.C. § 1291, because Senator Gravel had no other means of obtaining review and consequently the denial by the District Court of his motion to quash was, as to him, a final appealable order. *Perlman v. United States*, 247 U.S. 7 (1918). See *United States v. Ryan*, 402 U.S. 530, 533 (1971). The Court of Appeals therefore properly held that it had jurisdiction over the appeal (App. 3A). Similarly, this Court has jurisdiction.

aides about his actions in preparing for the Subcommittee hearing, as long as the questioning was not directed to the Senator's motives for holding the hearing.

The Court of Appeals issued a subsequent opinion denying a motion for reconsideration, in which it suggested that ordinary publication of a Subcommittee record might enjoy constitutional immunity but that the publication in question did not because it was done "privately" and because the Subcommittee had "no conceivable concern" with the documents entered into the record (App. 2C).

REASONS FOR GRANTING THE WRIT

The issues which are presented for review are ones of first impression which have not but which must be decided by this Court. These are issues which must be faced and resolved definitively sooner or later, and this is an appropriate and indeed urgent case. What is now before the Court is a classic Separation of Powers problem, and if not decided here and now, it might lead to an embarrassing and perhaps dangerous confrontation between the Legislative Branch on the one hand and the Executive and Judicial Branches on the other. A United States Senator has squarely and clearly raised a claim that his privileges and protections under the Speech or Debate Clause have been infringed by a Grand Jury inquiry, led by the Executive Branch, into his activities and those of his aides and associates in carrying out his duty of informing his colleagues and the electorate about acts committed by the Executive and, specifically, with respect to Executive conduct in foreign relations.

Despite the fact that the Speech or Debate Clause must be, and has by this Court been, "read broadly to effectuate its purposes," *United States v. Johnson*, 383 U.S. 169, 180 (1966), the Court of Appeals has effectively denied the applicability of the Clause to the informing function of Congress. The Court thus permitted the Grand Jury to investigate into Senator Gravel's exercise of the informing

function through the interrogation of "third parties"[4] such as Howard Webber and the Beacon Press, with whom the Senator dealt in order to publish and disseminate the Subcommittee record to his colleagues, constituents, and to the public at large. Far from being a broad reading of the privilege, this reading so restricts the scope of the Senator's privilege that it makes it impossible (or, to be more precise, dangerous) for a member of the Senate or the House to enlist the assistance necessary in order adequately to perform his legislative task of informing his constituents and colleagues about vital matters concerning the operations of government. It is this informing function of a member of the Legislative Branch which this Court has viewed as his most important task:

> "We are not concerned with the power of Congress *to inquire into and publicize* corruption, maladministration and inefficiency in agencies of the government. This was the only kind of activity described by Woodrow Wilson in *Congressional Government* when he wrote: 'The informing function of Congress should be preferred even to its legislative function.' *Id.*, at 303. *From the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature.* See Landis, Constitutional Limitations on the Congressional Power of Investigation, 40 Harv. L. Rev. 153, 168-194. *Watkins v. United States*, 354 U.S. 178, 200, fn. 33 (1957) (emphasis added).

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[4]The Court of Appeals, admitting that "the court is not in total agreement" on this point, nevertheless "presently" held that the Senator and his aides could not personally be questioned as to "republication," "without binding outselves for future purposes." (App. 11A). More exactly, the Court of Appeals found that the Sppech or Debate Clause privilege did not extend at all to the "republication," but that the Senator and his aides may be protected from direct interrogation by a common law privilege (App. 10-11A).

As much as speaking on the floor and voting, the informing function is an inherent part of the legislative process in representative government:

> [The Congressman's] duty is to acquire [knowledge about administration], partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case . . . The very fact of representative government thus burdens the legislature with this informing function . . . .
>
> . . . That duty, however, is not distinct from the legislative process, but implied and inherent in it. Landis, *supra* at 205-06 & n. 227.

This Court has consistently emphasized that the Speech or Debate Clause immunizes from judicial inquiry "legislative acts of . . . [a] member of Congress [and] his motives for performing them," *United States v. Johnson*, *supra* at 185. This standard has been variously expressed to encompass conduct which is "related to the due functioning of the legislative process," *id.*, at 172, or "in the sphere of legitimate legislative activity," *Tenney v. Brandhove*, 341 U.S. 367, 376 (1951), or "generally done in a session of the House by one of its members in relation to the business before it," *Kilbourne v. Thompson*, 103 U.S. 168, 204 (1881). Far from indulging in "catch-phrases" (App. 8A), this Court has but reconized that the history and policy of the Clause can be satisfied only by a broad standard that immunizes a Member of Congress for actions taken in the discharge of his obligations as a representative of the electorate and prevents intimidation and harassment by a possibly hostile Executive and Judiciary. It is for this reason that other legislative activities, such as obtaining material for committee hearings, *Dombrowski v. Eastland*, 387 U.S.

82 (1967), conduct at the hearings, *Tenney v. Brandhove, supra,* and committee resolutions and votes, *Powell v. McCormack,* 395 U.S. 486, 502-03 (1969), have been held entitled to protection. We think it evident that in our system of representative government, where "[l]egislators have an obligation to take positions on controversial political questions so that their constituents can be fully informed by them," *Bond v. Floyd,* 385 U.S. 116, 136 (1966), direct communication by a Senator to the electorate through the publication and distribution of committee reports, is legislative activity which is entitled to like protection.[5]

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[5]See Woodrow Wilson, *Congressional Government* (1885):

> The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration . . . (at 303).
>
> Quite as important as legislation is vigilant oversight of administration; and even more important than legislation is the instruction and guidance in political affairs which the people might receive from a body [Congress] which kept all national concerns suffused in a broad daylight of discussion (at 297).

Even if, as the Court of Appeals believes, focus should be confined exclusively to Congress' deliberative processes—which we submit is too narrow a view—it is clear that the colloquy between a congressman and the electorate is a prime determinant in influencing him in his decisions on pending legislation. The Court of Appeals did not rebut this argument, but rejected its consequences as "staggering," with reference to speculative examples of virtually unimaginable abuses (App. 10A, particularly n. 9). Identical "parade of horribles" arguments have been consistently rejected by this Court, even when the possibility of abuse was much less speculative. See, *e.g. Barr v. Matteo,* 360 U.S. 564, 576 (1959).

The issue of the degree to which the informing function of Congress is encompassed within the scope of the Speech or Debate Clause is presented herein with striking clarity. What is now before this Court is a classic separation of powers case. There is no claim here, in contrast to some civil cases, that a Member of Congress used the authority of his office to violate willfully an individual's constitutional rights. That kind of situation draws into play the obligation of the Courts to protect individual rights, and there may very well be circumstances where no other means is available to safeguard the preferred constitutional rights of the individual, and where the juriciary will therefore be compelled to draw the balance on the side of the individual. Cf. *Hentoff v. Ichord*, 318 F. Supp. 1175 (D.D.C. 1970).

In this case, on the other hand, the judiciary is not being asked to balance the rights of individuals, including preferred constitutional rights, against the privileges of Members of Congress; to the contrary, the Executive Branch of government has come to the courts and claimed that it may determine what a Member of Congress may tell his constituents about matters of overwhelming public concern. It is no exaggeration to say that this claim challenges the fundamental character of our tripartite system of government.

The Executive's contention that it may investigate and indeed prosecute for the publication of legislative proceedings flies in the face of the historical purposes of the Speech or Debate Clause. The Clause was drafted to secure absolute freedom of speech for Members of Congress. It was the end product of a lineage of legislative free speech guarantees from the English Bill of Rights of 1689 to the first State constitution and the Articles of Confederation. See generally *Tenney v. Brandhove, supra* at 372-75. None of these provisions drew a distinction between a speech of a legislator directed at his colleagues and one to his constituents. On the contrary, the Court in *Tenney* stated that the Clause was designed to protect both. *Id.*, at 377 and fn. 6. This is consistent with no less an authority than Thomas Jeffer-

son. When a Federal Grand Jury protested against abuses by Congressmen who disseminated slanderous accusations to the public, Jefferson responded that the framers of the Constitution wrote the Speech or Debate Clause to allow Congressmen to inform the electorate without inhibition:

> . . . that in order to give to the will of the people the influence it ought to have, *and the information which may enable them to exercise it usefully*, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive . . . .
>
> That . . . for the Judiciary to interpose in the legislative department between the constituent and his representative, *to control them in the exercise of their functions or duties towards each other*, . . . to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary . . . is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation, which requires essentially that the representative be as free as his constituents would be . . . ; *and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive.* 7 *Writings of Thomas Jefferson* 158 (Ford ed. 1898), quoted in Luce, *Legislative Assemblies* 516-18 (1924) (emphasis added).

The privilege must be read to protect the publication and public distribution of speeches and committee records. This is a principal avenue relied upon by Members of Congress to provide the people with "the information which may enable them to exercise [their will] usefully."

The Constitutional evil which would result from denying the privilege's applicability to the informing function of Congress is magnified when this is done at the behest of

the Executive and with respect to material which is critical of executive behavior. As this Court has emphasized, the central purpose of the Speech or Debate Clause is "to prevent intimidation by the Executive and accountability before a possibly hostile Judiciary."[6] *United States v. Johnson, supra* at 181. If the Executive Branch may, at will, institute Grand Jury proceedings and interrogate witnesses about Senators' publications of their speeches and committee reports which they send to the electorate, it will possess the power to isolate effectively all but the most courageous legislators from their constituents.[7] If such a rule applies, Congressmen will have to watch what they say to the people—in press releases, newsletters and anything spoken outside of the four walls of the Capitol—and they will inescapably be inhibited out of fear of harassment, Grand Jury inquisitions and even prosecutions. Yet if the Speech or Debate Clause means anything, it is that courts and prosecutors are not referees over what Congressmen may say to the people or how they may say it.[8]

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[6]One of the most notorious events crystalizing the struggle for the Parliamentary privilege was the vindictive action of Charles I against Sir John Eliot and other Members of Parliament who vocally opposed funding a needless and bloody war overseas. 3 How. St. Tr. 294, 332. See *Tenney v. Brandhove, supra* at 372.

[7]Compare Woodrow Wilson, *Congressional Government* (1885), at 303:

> It is the proper duty of a representative body to look diligently into every affair of government *and to talk much about what it sees*. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; *and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct* (emphasis added).

[8]See II *Works of James Wilson* (Andrews ed. 1896) at 38:

> In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest

The proper rule of Constitutional law was stated in *Methodist Federation for Social Action v. Eastland*, 141 F. Supp. 729, 731 (D.D.C. 1956) (three-judge court):

> Nothing in the Constitution authorizes anyone to prevent the President of the United States from publishing any statement . . . . Similarly, nothing in the Constitution authorizes anyone to prevent the Supreme Court from publishing any statement. We think it equally clear that nothing authorizes anyone to prevent Congress from publishing any statement.

The Court of Appeals placed reliance upon two early English cases[9] holding publication of legislative proceedings outside the Parliamentary privilege. This reliance is decidedly misplaced, for their underpinning has been repudiated and their holding has not survived. These cases had their genesis in a politically-motivated prosecution of the Speaker of the House of Commons, *Rex v. Williams*, 2 Show. K.B. 471, 89 Eng. Rep. 1048 (1794), and this decision was later declared to be "a disgrace to the country," *Rex v. Wright* 8 T.R. 293, 101 Eng. Rep. 1396 (King's Bench, 1799). At least since *Wason v. Walter*, L.R. 4 Q.B. 73 (1868), the settled law in England is that the Parliamentary privilege protects a member who publishes a speech "for the information of his constituents," and that the privilege applies derivatively to the publisher, because "such publication . . . is essential to the working of our Parliamentary system, and to the welfare of the nation." *Id.*, at 95. There is no reason in history or policy why the privileges of elected representatives in the United States should not be at least equal to those of their counterparts in England.

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liberty of speech, and that he should be protected from the resentment of everyone, however powerful, to whom the exercise of that liberty may occasion offense.

This Court has made it abundantly clear that the "powerful" of whom Wilson spoke, refers primarily to the Executive Branch. *United States v. Johnson, supra* at 180-81.

[9] *Rex v. Abington*, 1 Esp. 226, 170 Eng. Rep. 337 (1795); *Rex. v. Creevey*, 1 M. & S. 273, 105 Eng. Rep. 102 (1813).

The confusion which was endemic in British law before final reoslution by the highest court of England is now mirrored in our own country in conflicting decisions of the lower Federal courts. There are *dicta* in two prior cases which are consistent with the holding of the First Circuit. *Long v. Ansell*, 69 F.2d 386, 389 (D.C. Cir. 1934); *McGovern v. Martz*, 182 F. Supp. 343 (D.D.C. 1960).[10] On the other hand, there are two decisions which hold that the Speech or Debate Clause affords complete protection to Congressmen who publish committee records. *Hentoff v. Ichord*, *supra*; *Methodist Federation for Social Action v. Eastland*, *supra*.[11] Furthermore, the holding of the First Circuit conflicts in principle with the decision of the District of Columbia Circuit in *Hearst v. Black*, 84 F.2d 68 (D.C. Cir. 1936). This was an action to enjoin members of a Senate subcommittee chaired by then Senator (later Justice) Hugo L. Black from keeping, reproducing and distributing to his colleagues and to the public, documents which were alleged to have

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[10] *Long* was not even a Speech or Debate Clause case; it involved a claim of a Senator that he was immune from service of process because of the privilege from arrest in Article I, Section 6. The only reference to the Speech or Debate privilege was in a brief final paragraph. On review, the Supreme Court did not refer to the Speech or Debate Clause. 293 U.S. 76 (1934). In *McGovern*, the comments on "republication" were *dicta* because there was no publication except in the *Congressional Record*.

[11] The Court below distinguished these cases because they involved requests for injunctive relief to prevent the publication of defamation, which "although actionable, may not be enjoined" (App. 8A). Yet in neither case is there so much as a hint that this factual distinction entered into the decision. Moreover, *Hentoff* was not a defamation case; the plaintiffs sought relief on First Amendment grounds. The court held that the Speech or debate Clause deprived it of jurisdiction to consider a complaint "seeking any remedy" against the Congressmen for publication, 318 F. Supp. at 1179, and the court indicated quite clearly that the only reason it had jurisdiction to grant any relief against the Public Printer was because the publication would infringe the protected First Amendment rights of the plaintiffs. *Id.* at 1180.

been obtained illegally. The court dismissed the complaint on principles of separation of powers:

> . . . The prayer of the bill is that the committee be restrained from keeping the messages or making any use of them or disclosing their contents. In other words, that if we find that the method adopted to obtain the telegrams was an invasion of the appellant's legal rights, we should say to the committee and to the Senate that the contents could not be disclosed or used in the exercise by the Senate of its legitimate functions. We know of no case in which it has been held that a court of equity has authority to do any of these things. On the contrary, the universal rule, so far as we know it, is that the legislative discretion in discharge of its constitutional funotions, whether rightfully or wrongly exercised, is not a subject for judicial interference.
>
> The Constitution has lodged the legislative power exclusively in the Congress. If a court could say to the Congress that it could use or could not use information in its possession, the independence of the Legislature would be destroyed and the constitutional separation of the powers of government invaded. *Id.*, at 71-72.

The recurring nature of this issue and the conflicting decisions in the lower courts are additional reasons for this Court to clarify the extent of the Congressional privilege. A clear decision by this Court is necessary so that Members of Congress, who routinely inform their constituents by issuing press releases and by circulating copies of their speeches and committee reports and records, will know precisely what their rights are. Similar considerations led this Court to take review in *Barr v. Matteo, supra,* and *Howard v. Lyons,* 360 U.S. 593 (1959), and to hold that the judicially-created doctrine of executive privilege protects the issuance and circulation of news releases by the thousands of subordinate officials of the Executive Department. The Court of Appeals has not explained why the constitutional privilege of elected Members of Congress should be narrower.

Perhaps out of recognition that its holding was at odds with the thrust of prior decisions of this Court and was inconsistent as well with the history and policies underlying the Speech or Debate Clause, the Court of Appeals suggested that ordinary publication of committee reports might well be constitutionally protected but that this particular instance was not. This was implied in the initial decision[12] and stated beyond doubt in the second opinion (on rehearing), where the Court of Appeals "dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern" (App. 2C).

The clarifying language in the opinion on rehearing indicates clearly that the Court of Appelas has thus taken upon itself the power of determining whether or not a procedure followed by a Senator in the performance of his legislative functions is sufficiently "regular" so as not to divest his protection under the Speech or Debate Clause. In so doing the Court of Appeals has departed drastically from settled principles. Even the District Court recognized in its Opinion that "[t]he courts have no right to dictate . . . the procedures for Congress to follow in performing its functions . . .", and that "[j]udging the applicability of the legislative privilege in the exercise of the functions of the legislator's office should be done 'without inquiring whether the exercise was regular according to the rules of the House, or irregular and against their rules,' " 332 F.Supp. at 936. How a House of Congress internally allocates its functions

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[12] "We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor [Senator Gravel] had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto" (App. 10A).

and prescribes and enforces its procedures is a political question which is beyond the cognizance of the courts.[13] The judiciary has no more authority to tell a Senator what is germane to the subcommittee which he chairs than to adjudicate the current jurisdictional dispute between the Foreign Affairs and Armed Services Committees.

It is equally clear that there is nothing in the nature of "private" publication which may defeat the privilege. Technological developments in printing have so persuaded Congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution that it is now a dominant mode of publication. This Court may take judicial notice of the fact that, for example, every important commission report over the last decade has been printed privately,[14] as have transcripts of significant Con-

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[13]Of course, as with other variants of the political question doctrine, when a committee infringes upon an individual's constitutional rights, the courts may be obliged to examine enabling legislation in order to determine whether there is an overriding governmental interest. *E.g., Watkins v. United States*, 354 U.S. 178, 205 (1957). Here, no such claim is made by the Government, and the matter is "peculiarly within the realm of the legislature." *Ibid.* See also *Yellin v. United States*, 374 U.S. 109, 121-22 (1963), which drew this distinction precisely.

[14]See *Violence in America, Historical & Comparative Perspectives* (Graham and Gurr et als., Task Force on Historical & Comparative perspectives, Report to the National Commission on the Causes and Prevention of Violence) (New American Library, N.Y. 1969); *To Establish Justice, To Insure Domestic Tranquility* (National Commission on the Causes and Prevention of Violence, introd. by Reston) (Bantam Books, N.Y. 1970) ("Eisenhower Commission Report") (also published by Award Books, N.Y. 1969); *The Challenge of Crime in a Free Society* (President's Commission on Law Enforcement and Administration of Justice, introd. by Silver) (Avon Books, N.Y. 1968); *Rights in Conflict: The Violent Confrontation of Demonstrators and Police in the Parks & Streets of Chicago During the Week of the Democratic Convention of 1968* (Report to the National Commission on the Causes and Prevention of Violence, introd. by Max Frankel) (E.P. Dutton & Co., N.Y. 1968) ("The Walker Report") (also published by New American Library, introd. by Donovan, N.Y.

gressional committee hearings.[15] And even before this development became so pronounced, the Public Printer, who is after all distinguished only be being subsidized by the taxpayer, has not had a status at all different, under either American or English Law, from private printers who publish legislative proceedings.[16]

By making the applicability of the privilege for publication turn upon judgments of "germaneness" and "regularity", the Court of Appeals has hardly provided a limiting principle. It has, to the contrary, supplied yet more uncertainty, for the privilege is "of little value", if Congressmen must depend upon the way of a court or jury later speculates upon such amorphous concepts. See *Tenney v. Brandhove, supra* at 377.

Finally, the consequences of the decision of the Court of Appeals are not ameliorated by the fact that Senator Gravel and his aides will not personally be questioned before the Grand Jury. In allowing the interrogation of "third parties" into the legislative activities of a Congressman, so long as his "motives" are not attacked, the Court of Appeals misapprehended the holding of *United States v. Johnson, supra* at 173-76, where this Court barred inquiry

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1968); *Report by the U.S. National Advisory Commission on Civil Disorders* (Bantam Books, N.Y. 1968) ("The Kerner Commission Report"); *Report of the Commission on Obscenity and Pornography* (introd. by Barnes, Bantam Books, N.Y. 1970).

[15] See, *e.g.*, Senate committee hearings, republished as *The Vietnam Hearings* (copyright and introd. by J. W. Fulbright) (Random House. (paperback ed. Vintage Books), N.Y. 1966).

[16] See *Hentoff v. Ichord*, 318 F. Supp. 1175, 1180 (D.D.C. 1970); The Parliamentary Papers Act, §§I and II (3 & 4 Vict., c. 9 (1840)); *Wason v. Walter*, 4 Q.B. 73 (1868). It should be noted that in this case, Beacon Press made its paperback edition available to the public in sufficient quantity at a price of $20. for the set, while the Government Printing Office made available a limited printing of a censored edition, with unnumbered pages (making the work less useful as a research and reference tool) at a price of $50.

of anyone not only into motives but also into *how* the speech was prepared and into its precise ingredients. The rationale of the Corut of Appeals affords little, if any, protection to Congressmen, for in the course of their legislative activities they of necessity deal with innumerable people,[17] and questioning of them before the Grand Jury may accomplish by indirection precisely what the Court of Appeals recognized could not be done directly—the intensive breach of the sanctity of the legislative process. The Executive, with the assistance of the Grand Jury may, under this decision, investigate how a Congressman wrote a speech, what materials were in his possession, his conversations prior to voting or speaking out on controversial issues, how he prepared for a hearing, and how he made his speeches, reports and hearings available to his constituents—so long as the interrogators disclaim any intent to attack his motives. Aside from the clear violation of separation of powers thus effectuated, the intimidating potential of this approach and its possible effects on Congressional deliberations are awesome.

And surely there is nothing unique about the Grand Jury which justifies such a holding. Other investigative bodies, of at least equal stature and importance, have not been permitted to proceed unchecked when their investigations were perceived to have a similar impact upon First Amendment freedoms. See, *e.g.*, *DeGregory v. Attorney General of New Hampshire*, 383 U.S. 825 (1966), and cases cited therein at 829. There is no reason why the Grand Jury, which is subject to the supervisory powers of the Federal Courts, should not be governed by like restrictions when it intrudes into an area of prime constitutional importance.

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[17] It is difficult to imagine, for example, a Congressman being able to perform the informing function without the assistance of "third party" printers. Questioning Webber and Beacon Press officials about how Senator Gravel published the Subcommittee record would disclose precisely the same information about his legislative activities as if he and his aides were called.

CONCLUSION

Only six years ago, in but the third case dealing with the Speech or Debate Clause decided by this Court, Mr. Justice Harlan observed that "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause." *United States v. Johnson, supra* at 179. Since then, the Court has been obliged to take review three more times.[18] An important provision of the Constitution, adopted at the Convention without debate and viewed as axiomatic for most of our history, is now the center of controversy and doubt. This is an appropriate case for this Court, as the ultimate interpreter of the Constitution, to enunciate definitively the extent of the Congressional privilege.

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[18] *Dombrowski v. Eastland, supra; Powell v. McCormack, supra; United States v. Brewster,* No. 1025, jurisdiction postponed 401 U.S. 935, No. 70-45 (restored to the calendar for reargument) ___ U.S. ___, 40 U.S.L.W. 3351.

Petitioner respectfully prays that a writ of certiorari issue to review the judgment and opinions of the Court of Appeals for the First Circuit.

Respectfully submitted,

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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

No. 71-1331
and 1332

UNITED STATES OF AMERICA

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR

INTERVENOR, APPELLANT

No. 71-1335

UNITED STATES OF AMERICA,

APPELLANT,

v.

JOHN DOE.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before ALDRICH, *Chief Judge*,
MCENTEE and COFFIN, *Circuit Judges*.

David R. Nissen, Assistant United States Attorney, with whom *James N. Gabriel*, United States Attorney, and *Warren P. Reese*, Assistant United States Attorney, were on brief, for the United States.

Robert Reinstein and *Herbert O. Reid, Sr.* with whom *Charles L. Fishman* was on brief, for Mike Gravel, United States Senator.

Doris Peterson, *Peter Weiss*, *James Rief*, and *Morton Slaris* on brief, for Leonard Rodberg, Amicus Curiae in case No. 71-1335.

January 7, 1972

ALDRICH, *Chief Judge*. These cross appeals raise important questions as to the extent of the privilege afforded by the Speech or Debate clause of the Constitution. This clause, the separate and concluding part of Article I, Section 6, Clause 1, provides that ". . . for any Speech or Debate in either House, they [Senators and Representatives] shall not be questioned in any other Place." The issues arise in the context of a motion to limit the testimony that can be presented to a federal grand jury. The facts are these.

A copy of classified Defense Department documents, now widely known as the Pentagon Papers, containing hitherto unpublished facts concerning the background and conduct of the Vietnam War, found itself, unauthorizedly, in the hands of Senator Gravel, the junior senator from Alaska. The Senator was Chairman of the Senate Subcommittee on Public Buildings and Grounds. He called a meeting of the subcommittee, read to it a summary of the high points, and then introduced the entire Papers, allegedly some 47 volumes and said to contain seven million words, as an exhibit. Thereafter, he allegedly supplied a copy of the Papers to the Beacon Press, a Boston publishing house, owned by the Unitarian-Universalist Society, for publication.

These matters and the events preceding them have attracted the attention of a grand jury in the Massachusetts District. The court found, "The crimes being investigated by the grand jury include the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), and conspiracy to commit such offenses and to defraud the United States (18 U.S.C. § 371)." (Strictly, the court misused the word "public.")

Among other summoned witnesses were Leonard S. Rodberg, a legislative assistant to Senator Gravel, and Howard Webber, director of M.I.T. Press. Rodberg objected to testifying, on the ground of invasion of his First Amendment rights of freedom of association and freedom of the press,

and in addition, on the ground that as a legislative assistant to the Senator, he is protected by the Speech or Debate clause. The Senator himself has not been called, and the Department of Justice has stated that it has no intention of calling him. The court, however, permitted the Senator to intervene in the proceedings for the purpose of arguing that his own privilege under the Speech or Debate clause requires that the subpoenas issued to Rodberg and Webber be quashed, and that a protective order be issued suppressing certain other testimony. The resulting order the Senator, as the present appellant, finds too limited, and the government, as cross-appellant, too broad.

JURISDICTION

The government, correctly, points out that if the subpoena that was sought to be quashed was directed to intervenor, there could be no appeal from the refusal to quash unless he took the further step of refusing to comply, and was adjudicated in contempt. *Cobbledick v. United States,* 1940, 309 U.S. 323; *United States v. Ryan,* 1971, 402 U.S. 530. Here, however, the subpoena was not addressed to intervenor, but to third parties, who could not be counted on to risk contempt in order to protect intervenor's constitutional rights. *See United States v. Ryan,* ante, at 533. Hence he was "powerless to avert the mischief of the order" unless permitted to appeal it. *Perlman v. United States,* 1918, 247 U.S. 7, 13. The government's effort to take the case outside the *Perlman* exception, by arguing that intervenor will not suffer irreparable injury if the grand jury hears the evidence, assumes the correctness of its claims that no injury is cognizable unless and until intervenor is indicted. *Perlman,* however, illustrates that, to the contrary, a court, in determining whether an intervenor will suffer irreparable injury unless allowed to appeal, should assume his claim to be correct. We hold, therefore, that the order denying intervenor's motion is appealable.

THE ISSUES

The court's order, so far as presently material, provided as follows.

> "(1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971 nor about things done by the Senator in preparation for and intimately related to said meeting.
>
> "(2) Dr. Leonard S. Rodberg may not be questioned about his own actions on June 29, 1971 after having been engaged as a member of Senator Gravel's personal staff to the extent that they were taken at the Senator's direction either at a meeting of the Subcommittee on Public Buildings and Grounds or in preparation for and intimately related to said meeting."

This order was preceded by a comprehensive recitation of facts, some of which we do not repeat, and discussion of the legal principles. *United States v. John Doe, In re Rodberg*, D. C. Mass., 1971, 332 F. Supp. 930. By a subsequent order the court refused further relief, except for a brief temporary stay, which we extended.

The response of both parties is extreme. Intervenor's brief suggests that the entire inquiry is improper.

> "There probably is no clearer case of the prostitution of the grand jury process than is daily evidenced [here] . . . . This Court is thus presented by the government with a flagrant misuse of the subpoena power of the grand jury . . . [by the executive]. This represents a fundamental perversion of the function of the grand jury. . . ."

The government does not make the rejoinder that intervenor's own action in disclosing documents which were, in his own words, "critical of Executive conduct in foreign affairs," had no conceivable relevance to the functions of

the Subcommittee on Public Buildings and Grounds; a matter which would seem self-evident.[1] While recognizing that that claim would be (at least largely, see post) irrelevent, it does take the extreme position that while legislators may not be questioned "for" their speech or debate, in the sense of being held accountable, they may be freely questioned "about" them.

"SPEECH OR DEBATE"— THE SCOPE OF THE PRIVILEGE

The areas in which intervenor objects to questioning are three—speech or debate itself, or publication; preparation, or pre-publication, and, finally, republication. We will consider them in that order.

a) *Publication*

For what he says or does on the floor of the Senate, or before the subcommittee, intervenor is concededly protected by an absolute privilege from all criminal and civil liability. *See United States v. Johnson*, 1966, 383 U.S. 169; *Tenney v. Brandhove*, 1951, 341 U.S. 367. It is equally clear that this protection extends to any written reports of the committee proceedings addressed to Congress, including material unspoken at the hearing but inserted directly into the record. *See Kilbourne v. Thompson*, 1880, 103 U.S. 168, 204; *McGovern v. Martz*, D.D.C., 1960, 182 F. Supp. 343, 347. The privilege protects against a claim of irrelevancy, *see Cochran v. Couzens*, D.C. Cir., 1930, 42 F.2d 783, 784, as well as of falsity and malice. The government would argue that intervenor could be questioned "about" his conduct for this very reason, drawing the analogy that one who is

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[1] Nor does the government point out that intervenor, although relying elsewhere on the public's "right to know" (*see* n. 5, post) basically is seeking to block exposure of how he exposed what, in turn, the Executive did not wish to have exposed.

immune from prosecution cannot claim the protection of the Fifth Amendment.

In our view this misconceives the scope and purpose of the Speech or Debate clause, which is not principally to protect the person and pocketbook of legislators, but, rather, is to ensure freedom of debate. *United States v. Johnson*, ante, at 180-82. Intimidation of a legislator, harassment, embarrassment with the electorate, all may be achieved short of obtaining a criminal or civil judgment. *Cf. United States v. Johnson*, 4 Cir., 1964, 337 F.2d 180, 191, *aff'd*, 383 U.S. 169. Since these consequences can flow from mere inquiry, the possibility of judicial inquiry could itself serve as an effective deterrent to speaking out against executive policy, *Id.* Further, although it seems to us relatively less important, the time required to respond to such an inquiry would be inconsistent with another purpose of the Speech or Debate clause, which is "to insure that legislators are not distracted from or hindered in the performance of their legislative tasks." *Powell v. McCormack*, 1969, 395 U.S. 486, 504; *see Tenney v. Brandhove*, ante, at 377. We cannot accept the government's distinction between questioned "for" and questioned "about."[2] Nor do we think that the place of questioning, whether it be before the grand jury or before a petit jury, determines its palatability. The legislator need not answer questions anywhere.

b) *Pre-publication*

Turning to the pre-publication period, we note that we are concerned not with whether a legislator may be protected from prosecution for illegal conduct in obtaining information for use in a congressional proceeding, but only

[2]On the other hand, while we are discussing terminology, except insofar as his hyperbole quoted ante may so suggest, we do not believe intervenor contends that his constitutional protection against questioning means that the government cannot prove aliunde wrongful acts by others which, by implication, may bring his own conduct "into question." There could be no merit in such a claim.

with the extent to which the constitutional privilege bars grand jury questioning. Different considerations may well apply. Effective debate presupposes access to facts. *See generally* Cella, The Doctrine of Legislative Privilege of Freedom of Speech and Debate; Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts, 2 Suffolk L. Rev. 1, 36 (1968). Since the scope of the privilege should be as broad as is necessary to achieve its purpose of assuring full and free debate, *see Stockdale v. Hansard*, 1839, 9 Ad. & E. 2, 150, 112 Eng. Rep. 1112, 1169, we include therein inquiries which would restrict acquisition of information. It seems manifest that allowing a grand jury to question a senator about his sources would chill both the vigor with which legislators seek facts, and the willingness of potential sources to supply them. *Cf. Caldwell v. United States*, 9 Cir., 1970, 434 F.2d 1081, *cert. granted* 402 U.S. 942. Whatever the accommodation that must be made with respect to the public interest in prosecuting crime, *cf. Dombrowski v. Eastland*, 1967, 387 U.S. 82, we cannot accept that it is to be drawn in favor of permitting direct inquiry of a legislator.[3] To what other persons this protection may extend we will consider later. All government action cannot be frozen in the name of chilling speech. *Cf. United States v. O'Brien*, 1968, 391 U.S. 367.

c) *Republication*

Intervenor in his appeal contends that the clause comprehends not only the delivery of a congressional speech and conduct antecedent thereto, but also conduct subsequent to the speech aimed at its wider dissemination, including private republication. Apart from republication such as in the news media or the Congressional Record, which is the

[3] In *New York Times v. United States*, 1971, 403 U.S. 713, the Court accommodated related free speech interests in holding that the newspaper's conduct could not be enjoined, although, as pointed out in Mr. Justice White's concurring opinion, it may have been criminal. *Id.*, at 730-41.

natural consequences of a speech and is necessarily protected, *see McGovern v. Martz*, ante, at 347, no American court appears to have decided this question.[4] *But cf. id.; Long v. Ansell*, D.C. Cir., 1934, 69 F.2d 386, 389, *aff'd.* 293 U.S. 76. In urging us to resolve it in his favor, intervenor acknowledges that it will not affect his freedom to speak, since the speech has already been made, but argues that republication is essential to the "due functioning of the legislative process," *United States v. Johnson*, ante, 383 U.S. at 172, and is "generally done" by members of Congress.[5] *Kilbourne v. Thompson*, ante, at 204. *See also Stockdale v. Hansard*, ante, at 150, 1169. The difficulty is that the term "legislative process" is no more self-defining than "Speech or Debate." The language and history of the Speech or Debate clause is a surer guide to the scope of the privilege than catch-phrases, and we find in both a focus upon mat-

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[4] We put to one side cases refusing an injunction, as involving different considerations. *See Hentoff v. Ichord*, D.C.C. 1970, 381 F. Supp. 1175; *Methodist Federation for Social Action v. Eastland*, D. D.C., 1956, 141 F. Supp. 729; *cf. New York Times v. United States*, n. 3 ante. In the more common situation, it has long been settled that the publication of defamation, although actionable, may not be enjoined. *E.g., Crosby v. Bradstreet Co.*, 2 Cir., 1963, 312 F.2d 483, 485, *cert. denied* 373 U.S. 911; *Kidd v. Horry*, C.C. E.D.Pa., 1886, 28 F. 773.

[5] "The Framers presuppose[d] the maximum amount of communication between the citizens and their elected representatives."

"The people must be informed fully of the workings of government."

"The heart of representative democracy is the communicative process between the people and their agents in government."

"Informing the electorate is a 'legislative act' since it is clearly 'related to the due functioning of the legislative process.' *United States v. Johnson, supra* at 172. In fact, it is not exaggeration to say that direct communication between a Member of Congress and the electorate is an essential bedrock of the legislative process, for it insures that the people will inform *him and his colleagues* [sic] of their well-considered views on pending and future legislation—an indispensable prerequisite for each Congressmen deciding how to cast his own vote."

ters occurring in the course of deliberation. This had been the English concept upon which our privilege had been patterned.[6] Two English cases, decided shortly after the enactment of the American constitution, held that the parliamentary privilege did not immunize members from civil liability for libels contained in privately published reproductions of their parliamentary speeches. *Rex v. Creevey*, 1813, 1 Maule & Selwyn 273; *Rex v. Lord Abington*, 1795, 1 Esp. N.P. Cases 228. See generally T.E. May, Treaties on the Law, Privileges, Proceedings and Usage of Parliament 48-66 (16th ed. E. Fellowes & T.G.B. Cocks 1957); C.F. Wittke, The History of English Parliamentary Privilege 23-32 (1921). Our courts have expanded the privilege beyond the act of debating within Congress a proposal before it only when necessary to prevent indirect impairment of such deliberations. *See Kilbourne v. Thompson*, ante; *Coffin v. Coffin*, 1808, 4 Tyng (Mass.) 1.

We do not find private republication within that category. The fact that it may be customarily done by members of Congress is not the answer.[7] Only those acts by which a congressman ordinarily expresses to the House his views on matters before it come within the Supreme Court's extension of the privilege to "things generally done . . . *in relation to the business before [Congress].*" *Kilbourne v. Thompson*, ante, at 204. (Emphasis supplied)

Intervenor's argument that communicating with the electorate is essential to effective deliberation because it elicits responses to guide is legislative decisions and because it

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[6] "[I]t may be reasonably inferred that the framers of the Constitution meant the same thing by the use of language borrowed from that source." *Kilbourne v. Thompson*, ante, at 202.

[7] *Cf. United States v. Johnson*, ante, at 172. There the Court observed that an attempt to influence the Department of Justice in favor of a constituent was unprotected, yet assisting constituents is just as customary a function as communicating with them. See generally V.O. Key, Politics, Parties and Pressure Groups (3d ed. 1952); R. Davidson, The Role of the Congressman 99 (1969).

helps to put pressure upon other legislators (n. 5, ante, ¶4) proves too much. If accepted, it would bring within the privilege not only republished congressional speech, but speeches delivered anywhere. But even restricted to repeating what has once been said in a legislative context, the consequences of an unlimited absolute privilege would be staggering. We do not believe intervenor has struck such gold in a field previously thought to be barren.[8] The fact that some repetition may be inevitable does not mean that there should be immunity to add to it. *Cf. Murrary v. Brancato,* 1943, 290 N.Y. 52 (no privilege for judge to circulate privately a calumnious opinion); see Annot., 146 ALR 913. We will not hold that there is a constitutional privilege to print privately what, we must assume for present purposes, were classified documents simply because intervenor had first disclosed them to a Senate subcommittee whose function was totally unrelated thereto.[9]

The fact that republication is not within the constitutional privilege does not exclude consideration of other protection. To the extent that a congressman has responsibility to inform his constituents, his performance of that responsibility may be protected from liability by a common law privilege, as is an executive official's. A news release about the speech may well be as protected as the speech itself. *Cf. Barr v. Mateo,* 1959, 360 U.S. 564 (absolute immunity given executive officer for libel contained in news release). How far

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[8]Those with long memories may recall the frequent, but unaccepted, challenges to a former junior senator from Wisconsin to repeat outside the walls of Congress the calumnies he often expressed within their protection. If intervenor is correct, we would see no reason for distinguishing between the types of legislative speech that could be repeated.

[9]Examples might be multiplied. If an unpublished manuscript was taken by parties unknown and subsequently was introduced into the records of a Congressional committee, could it be thought that the common law copyright was lost by reason of the Speech or Debate clause? Or, in the case of a published work, that the statutory copyright would thereby be extinguished?

this immunity should go will depend upon the facts of the particular case. An even more difficult question is whether the measure of the grand jury's right to make personal inquiry of the legislator follows the immunity. Arguably, it may go further, or not so far. Because we do not consider this a matter of present substantial importance, and partly because the court is not in total agreement, we presently resolve it, without binding ourselves for future purposes, if the matter is more sharply put, that he may not be questioned at all as to republication.[10] We do not, of course, mean by this that we are ruling, even tentatively, on the limits of criminal liability.

WITNESSES PRECLUDED

It may be wondered why, since under *Cobbledick v. United States*, ante, until he has been held in contempt we apparently have no jurisdiction to advise intervenor as to the measure of his immunity from testifying, we have nevertheless been answering that question. The reason is that such answer is a necessary condition to passing upon the immunity of others, such as Rodberg, who intervenor claims in this appeal to come under his legislative protection. We now turn to this.

a) *Legislative Aides*

It is not only accepted practice, but, we would think indispensable, for a legislator to have personal aides in whom he reposes total confidence. This relationship could not exist unless, during the course of his employment, the aide and the legislator were treated as one. To the extent, if any, that there might be exceptions, again, for present purposes, we do not inquire. We note, however, that this synomymity is founded upon the relationship, not on the

[10] In part we do this because we propose, so far as possible, to make a practicable decision that avoids unnecessary or doubtful points that might burden the Supreme Court.

fact of employment. Rodberg, for example, is not protected from inquiry as to events unconnected with intervenor at the time of occurrence. We reject intervenor's contention that the fact of hiring insulated him from all inquiry as to prior events related to the Papers, but not to intervenor. *See Heine v. Raus*, 4 Cir., 1968, 399 F.2d 785, 190-91.

b) *Third Parties*

United States v. Johnson, ante, holds that any person who dealt with a legislator with respect to speech or debate can not be inquired of if the object is to attack the legislator's motives in speaking. Specifically, it could not be shown that the defendant's speech was written by a constituent, or that the defendant was paid to deliver it. The Court did not suggest that a legislator was free in all respects from criminal prosecution. *But see id.*, at 185. Indeed, were it to be thought so, one need only turn to the other portions of the Clause, which regulates, procedurally, criminal trials. With respect to third persons, provided that the principles of *Johnson* are observed, we can see no reason for them to be free of inquiry as to their own conduct regarding the Pentagon Papers, including their dealing with intervenor or his aides. We have already spoken as to Rodberg, pre-employment. At the other end, so far as intervenor's privilege is concerned, we hold that no immunity was conferred upon Beacon Press simply because, if he did, intervenor delivered the Papers to it for private publication. Indeed, we would hold, if his appeal can be thought to raise that question,[11] that whatever Beacon Press

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[11] We take it that intervenor believes it does, in the light of a contempt proceeding he instituted when he erroneously believed the United States Attorney was using a subpoena to examine the Beacon Press' bank records during the processing of this appeal.

did is freely inquirable even to the extent, if any (it has not presently been suggested), that it may have made payments to intervenor or others in connection with the Papers subsequent to their introduction into the subcommittee records. Payment for delivering a copy, by a post-speech agreement, is not comparable to a payment for initially delivering the speech. Similarly, the district court's refusal to include Webber in its order was correct.

PROCEDURE

Intervenor has presented us with a request covering the type of witnesses he believes should be excluded altogether, and an elaborate procedure for the court to employ as to testimony the government proposes to introduce through other witnesses. Much of this request goes by the board with our rejection of some of his basic premises. As to the rest we find such procedure unnecessarily cumbersome, and suggest a simpler solution. Intervenor may supply a list of his personal aides, and the dates of their employment. Upon the court's being satisfied as to the correctness of the list it shall order that no questions be asked of any of them relating to the Pentagon Papers or to intervenor's legislative activities during the period of their employment. It shall further order that no questions be asked of any other witness as to communications with intervenor regarding legislative activities, including the furnishing of information, or with his aides during such periods, directed to intervenor's motives or purpose in introducing the Papers into the subcommittee records. We believe the contempt power of the court will be a sufficient guarantee of enforcement without the need of adopting intervenor's extraordinary request that every question be submitted to him for approval before it is asked.

Except to the extent that it is modified herein the order of the district court is affirmed. Even though intervenor has essentially lost his appeal, we do not believe this an appropriate case in which to award costs.

APPENDIX B

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIRST CIRCUIT

Nos. 71-1331
and 71-1332.

UNITED STATES OF AMERICA,

v.

JOHN DOE,

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

JUDGMENT

Entered: January 7, 1972

These causes came on to be heard on appeals from the United States District Court for the District of Massachusetts, and were argued by counsel.

Upon consideration whereof, It is now here ordered, adjudged and decreed as follows: The orders of the District Court of October 28, 1971, are affirmed, except that the Protective Order of that date is modified to read as follows:

(1) No witness before th grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or pur-

poses behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.

(2) Dr. Leonard S. Rodberg may not be questioned about his own actions while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

No costs on these appeals.

The court does not propose to stay mandate beyond the statutory period except upon motion, which must be shortly made, showing substantial cause.

By the Court:

/s/ DANA H. GALLUP
Clerk.

[cc: Messrs. Fishman, Reid, Reinstein and Nissen.]

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331
and 71-1332

UNITED STATES OF AMERICA,

v.

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Before Aldrich, *Chief Judge*
McEntee and Coffin, *Circuit Judges.*

On Petition for Rehearing, etc.

January 18, 1972

Robert J. Reinstein and Charles L. Fishman for appellant.

David R. Nissen, Assistant United States Attorney, for appellees.

ALDRICH, *Chief Judge.* Intervenor has filed a petition for "reconsideration." The word is accurately used; intervenor is arguing the same points he made before. His proffered excuse is that the "expedited schedule . . . severely constricted . . . research." If this was so, it is the first we have heard of it. No pre-argument protest of lack of time was raised; no protest was made at the argument; no request was made for permission to file a further brief, either then, or during the eight weeks we had the matter under advisement. Nor should it be forgotten that petitioner sought intervention in August 1971. We would have thought he had ample opportunity to do his research. F.R.A.P. 40 was not promulgated as a crutch for dilatory counsel, *Cross Baking Co. v. NLRB,* 1 Cir., 12/30/71, ___ F.2d ___, nor, in the absence of a demonstrable mistake, to permit reargument of the same matters.

We pass this, in view of the importance of the case. More difficult to overlook is the fact that, with our views and reasoning now fully before him, intervenor, in rearguing the republication issue, fails to address himself to our specific "attempts to reconcile fundamentally antagonistic social policies" (*Barr v. Mateo,* 1959, 360 U.S. 564, 576). Further generalities about "legislative activity in the classic and historic sense" do not indicate to us why we are wrong in drawing a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of, we must presently assume, lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern. In repeating the familiar arguments why he should be absolutely protected with respect to introducing the exhibits before the subcommittee—a matter no one questions—and talking broadly about his duty to inform the public, intervenor does not answer our analysis of what should be the subsequent limits of protection.

The petition for reconsideration is denied.

Alternatively, petitioner seeks clarification of our order. We do not, however, understand how he can think the order permits inquiry of third persons directed to his motives. We see no need of clarification here. His further inquiry, whether the questions could be asked of third parties about "preparation for the hearing if that *relates* to his motives for holding it," (emphasis supp.) perhaps calls for comment. During oral argument we posed a hypothetical, not repeated in our opinion, but to which intervenor now returns. Suppose that the President's private diary is stolen, and thereafter a Congressman introduces it into the legislative record. Petitioner's present brief suggests that since this would be an exercise of "the informing function of exposing Executive behavior," the only answer he would have to make would be to the "House and . . . the people," unless he participated in the theft. His point is put best in the form that preparation is part of speech, and that if inquiry may be made even as to third parties as to the sources, he will be inhibited. Here, it seems to us, some adjustment of competing interests must be made. We believe that if a document shown to be improperly at large is sought to be traced, it may be traced by inquiry of third parties even if the effect may be to lead to a legislator. In *United States v. Johnson,* 1966, 383 U.S. 169, the prosecution was barred from questioning third parties about their role in preparing a congressional speech only because the questions were directed to proving that the speech itself was part of a criminal conspiracy. This should not mean that all illegal activity is insulated from inquiry, apart from prosecution, simply because it could be characterized as preparation for a speech. The introduction of the document into the subcommittee records, like Thetis' immersion of Achilles, cannot effect universal protection.

Intervenor has a valid point with respect to the portion of the order relating to Rodberg. This is clarified by inserting after the phrase "his own actions" the words "in the broadest sense, including observations and communications, oral or written, by or to him, or coming to this attention."

This brings us to the government's motion to revoke our stay, which was granted broadly, pending appeal, to cover all facets of intervenor's contentions. With a limit of time on the grand jury proceedings, we amend the stay by substituting the order called for by our opinion, and contained in the judgment, but as presently clarified as to Rodberg. This amendment and substitution is, in turn, stayed until January 26, 1972, to permit intervenor, if he sees fit, to apply forthwith, prior to Friday of this week, to the Circuit Justice.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331

UNITED STATES OF AMERICA,

v.

JOHN DOE,

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1332

SAME.

v.

SAME

SAME

Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

ORDER OF COURT
Entered January 18, 1972

Pursuant to opinion of instant date, the broad stay granted on October 29, 1971, as modified, is hereby revoked and there is substituted the order contained in the judgment of January 7, 1972 as clarified by the explanatory clause contained in our opinion defining

> "actions" as "in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention."

The present order of revocation and substitution is stayed until January 26, 1972.

The motion for clarification is otherwise denied.

The motion for reconsideration is denied.

By the Curt

/s/ Dana H. Gallup
Clerk.

[cc: Messrs. Fishman, Reid, Reinstein and Nissen.]